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ATTORNEY GENERAL OF NEW JERSEY
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P.O. Box 112
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*Attorney for Defendants New Jersey Department of Corrections, Steven Johnson, Stephen D'Ilio,
Charles Warren, Amy Emrich, Troy Black, Janice Brown, Raphael Dolce, Gerard Doran, Orlando
Gil, Paul Lewis, Phillip Mandap, and Mark Tynan*

By: Nicholas Falcone
Deputy Attorney General
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NJ Bar No. 264332018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
VICINAGE OF TRENTON

MILTON DURHAM,

Plaintiff,

v.

NEW JERSEY DEPARTMENT OF
CORRECTIONS, et al.,

Defendants.

:
: Hon. Michael A. Shipp, U.S.D.J.
: Hon. Tonianne J. Bongiovanni, U.S.M.J.

:
: CIVIL DOCKET NO.
: 3:20-cv-05584

:
: **ANSWER AND DEFENSES TO**
: **PLAINTIFF'S AMENDED COMPLAINT**
: **BY DEFENDANTS DOLCE AND**
: **MANDAP**

TO: Clerk of Court

Michael Poreda, Esq.
Wronko Loewen Benucci
69 Grove Street
Somerville, NJ 08876
Counsel for Plaintiff

Defendants Raphael Dolce and Phillip Mandap (“Answering Defendants”), by and through counsel, Gurbir S. Grewal, Attorney General of New Jersey, by Nicholas Falcone, Deputy Attorney General, hereby answer Plaintiff’s Amended Complaint (ECF No. 6) as follows:

The first paragraph of the complaint, which is unnumbered, is admitted.

1. Admitted only that Plaintiff is an inmate in the custody of the New Jersey Department of Corrections. Answering Defendants lack knowledge or information sufficient to form a belief as to the truth or veracity of the other allegations set forth in this paragraph.

2. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs.

3. Answering Defendants lack knowledge or information sufficient to form a belief as to the truth or veracity of the allegations set forth in this paragraph.

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11. Answering Defendants lack knowledge or information sufficient to form a belief as to the truth or veracity of the allegations set forth in this paragraph.

12. Denied.

13. Answering Defendants lack knowledge or information sufficient to form a belief as to the truth or veracity of the allegations set forth in this paragraph.

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58. Answering Defendants lack knowledge or information sufficient to form a belief as to the truth or veracity of the allegations set forth in this paragraph.

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75. Answering Defendants lack knowledge or information sufficient to form a belief as to the truth or veracity of the allegations set forth in this paragraph.

76. Admitted.

77. Admitted.

78. Denied as stated. Admitted only that Plaintiff was located in Unit 7 Up – 7 Tier on February 3, 2017.

79. Answering Defendants lack knowledge or information sufficient to form a belief as to the truth or veracity of the allegations set forth in this paragraph.

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COUNT 1

112. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs.

113. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs.

114. Denied.

115. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs.

116. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs.

COUNT 2

117. Denied.

118. Denied.

119. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent these allegations are deemed factual, they are denied.

120. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent these allegations are deemed factual, they are denied.

121. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs.

COUNT 3

122. Admitted.

123. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs.

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130. Denied.

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COUNT 4

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162. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent that these allegations are deemed factual, they are denied.

COUNT 5

163. Answering Defendants lack knowledge or information sufficient to form a belief as to the truth or veracity of the allegations set forth in this paragraph.

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165. Answering Defendants lack knowledge or information sufficient to form a belief as to the truth or veracity of the allegations set forth in this paragraph.

166. Denied.

167. Answering Defendants lack knowledge or information sufficient to form a belief as to the truth or veracity of the allegations set forth in this paragraph.

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171. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent that these allegations are deemed factual, they are denied.

COUNT 6

172. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent that these allegations are deemed factual, they are denied.

173. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs.

174. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent that these allegations are deemed factual, they are denied.

COUNT 7

175. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent that these allegations are deemed factual, they are denied.

COUNT 8

176. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent that these allegations are deemed factual, they are denied.

COUNT 9

177. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent that these allegations are deemed factual, they are denied.

COUNT 10

178. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent that these allegations are deemed factual, they are denied.

179. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent that these allegations are deemed factual, they are denied.

180. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent that these allegations are deemed factual, they are denied.

181. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent that these allegations are deemed factual, they are denied.

COUNT 11

182. Answering Defendants lack knowledge or information sufficient to form a belief as to the truth or veracity of the allegations set forth in this paragraph.

183. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs.

184. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs.

COUNT 12

185. Denied.

186. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs.

187. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs.

188. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs.

189. Answering Defendants lack knowledge or information sufficient to form a belief as to the truth or veracity of the allegations set forth in this paragraph.

190. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs.

COUNT 13

191. Denied.

192. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent that these allegations are deemed factual, they are denied.

193. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent that these allegations are deemed factual, they are denied.

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COUNT 14

201. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent that these allegations are deemed factual, they are denied.

202. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent that these allegations are deemed factual, they are denied.

203. This paragraph contains legal conclusions, to which no response is required. Plaintiff is left to his proofs. To the extent that these allegations are deemed factual, they are denied.

RELIEF

WHEREFORE, Answering Defendants deny that Plaintiff is entitled to the relief he seeks and demand judgment dismissing Plaintiff's Complaint with prejudice, together with an award of attorney's fees and costs of suit to Answering Defendant.

SEPARATE DEFENSES

1. The complaint fails to state a claim against Answering Defendants upon which relief may be granted.

2. Answering Defendants have not deprived Plaintiff of any right, privilege or immunity secured to him by the New Jersey or United States Constitutions or any Act of Congress or the Legislature of New Jersey.

3. Answering Defendants are not guilty of negligence and violated no duty to Plaintiff.

4. Negligence, if any, on the part of the Answering Defendants is not the proximate cause of any injuries which may have been sustained by Plaintiff.

5. The action is so lacking in fact-based merit as to warrant dismissal with prejudice.

6. Damages, if any, were the result of the Plaintiff's own actions and/or inactions.

7. Damages, if any, sustained by the Plaintiff were the result of the actions of persons and/or entities over whom the Answering Defendants had no control.

8. Answering Defendants reserve the right to interpose each and every such separate defense that continuing investigation and discovery may indicate.

9. Plaintiff has not pled and cannot establish a viable claim of constitutional deprivation due to a policy, practice or custom of constitutional violations.

AFFIRMATIVE DEFENSES

1. At all times relevant hereto, Answering Defendants acted in good faith and without fraud or malice.
2. Answering Defendants are immune from suit.
3. Answering Defendants were/are employees of an agency of the State of New Jersey and at all relevant times were performing acts within the scope of their official duties in good faith without fraud or malice, and are immune from liability sought to be imposed upon them based on the doctrine of qualified immunity.
4. The theory of Respondeat Superior cannot be utilized in § 1983 actions.
5. This suit is barred under the Eleventh Amendment.
6. The complaint is barred by the doctrine of res judicata and/or collateral estoppel.
7. Recovery is barred in this action by reason of the applicable statutes of limitations.
8. State agencies or individual state employees acting in their official capacities are not persons capable of being sued within the meaning of 42 U.S.C. § 1983.
9. Insofar as claims asserted against the Answering Defendants allege tortious acts, they are governed by and subject to the New Jersey Tort Claims Act, N.J.S.A. 59:1-1, et seq. Failure to file a notice of claim pursuant to, N.J.S.A. 59:8-1 precludes plaintiff from asserting those claims.
10. Answering Defendants are not liable for acts taken in good faith in the enforcement of any law pursuant to N.J.S.A. 59:3-3.
11. Answering Defendants are not liable for injuries resulting from discretionary activities pursuant to N.J.S.A. 59:2-3.

12. Answering Defendants are not liable for the adoption of or failure to adopt any law or by the failure to enforce any law pursuant to the provisions of N.J.S.A. 59-3-5.

13. Any liability that might otherwise be imposed upon Answering Defendants pursuant to N.J.S.A. 59:1-1, et seq. is subject to reduction by the limitations of proportionate liability set forth in N.J.S.A. 59:9-3.1.

14. Any liability that might otherwise be imposed upon Answering Defendants pursuant to N.J.S.A. 59:1-1, et seq. is subject to reduction by the comparative negligence provisions set forth in N.J.S.A. 59:9-4.

15. Any recovery to which Plaintiff may be entitled against Answering Defendants pursuant to N.J.S.A. 59:1-1, et seq. is subject to the limitations and reductions on damages set forth in N.J.S.A. 59:9-2.

16. Answering Defendants are subject to the immunities and the defenses provided by N.J.S.A. 59:2-1.

17. Any actions taken by Answering Defendants were in the nature of discretionary activity within the meaning of N.J.S.A. 59:3-2, and accordingly, no liability may be imposed upon Answering Defendants.

18. Plaintiffs' claims must be dismissed because Answering Defendants committed no violation of public policy.

19. Answering Defendants performed each and every duty, if any, owed to the Plaintiff.

20. Any action or inaction on the parts of Answering Defendants was a result of the exercise of judgment or discretion vested in Answering Defendants within the meaning of the applicable law.

21. Answering Defendants acted in good faith without malicious intent in carrying out all duties.

22. Punitive damages cannot be awarded against Answering Defendants under both common law and statute.

23. Plaintiff is not entitled to an award of economic damages against Answering Defendants.

24. Plaintiff is not entitled to an award of interest against Answering Defendants.

25. Plaintiff failed to take reasonable and necessary measures to mitigate damages.

26. Answering Defendants acted within the scope of their authority and, therefore, have qualified immunity.

27. Answering Defendants are protected by the defenses and immunities provided by the Prison Litigation Reform Act.

28. Plaintiff has failed to exhaust his administrative remedies in accordance with the Prison Litigation Reform Act.

JURY DEMAND

Answering Defendant demands a trial by jury for all issues of fact.

DESIGNATION OF TRIAL COUNSEL

Please be advised that Nicholas Falcone, Deputy Attorney General, is hereby designated as trial counsel.

CERTIFICATION OF SERVICE

I, Nicholas Falcone, hereby certify that Answering Defendants' Answer and Defenses to Plaintiff's Amended Complaint and Jury Demand was electronically filed with the Clerk of the United States District Court and all attorneys of record, and that copies will be sent to:

Michael Poreda, Esq.
Wronko Loewen Benucci
69 Grove Street
Somerville, NJ 08876
Counsel for Plaintiff

Respectfully submitted,

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: s/ Nicholas Falcone
Nicholas Falcone
Deputy Attorney General

Dated: April 21, 2021